Win-win policy that puts blood safety first

By Scott Schoettes

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Collected units of blood are stored in a walk-in cooler at the Manufacturing Lab at the American Red Cross in Philadelphia in 2008.

In the early years of the AIDS crisis, as the medical establishment grappled with the little-understood disease, the U.S. Department of Health and Human Services decided to ban blood donations from gay and bisexual men, ostensibly to protect the nation's blood supply. Today, however, with much-improved understanding of HIV and AIDS, and quicker and more sensitive testing protocols, the 31-year-old blanket ban makes no scientific sense, if ever it did, and serves only to perpetuate discrimination and stigma.

As the oldest national organization committed to achieving the full recognition of the civil rights of the lesbian, gay, bisexual and transgender community and people living with HIV, Lambda Legal has been advocating against the MSM (men who have sex with men) blood donation ban since its implementation, underscoring the discriminatory and arbitrary nature of the ban and its focus on the sexual orientation and gender identity of the potential donor rather than on conduct.

Recently, the HHS Advisory Committee on Blood and Tissue Safety and Availability issued a recommendation that the deferral period for blood donations from gay and bisexual men be reduced to one year from the current lifetime ban. This recommendation follows growing pressure from LGBT advocates and the medical establishment, including the Red Cross, the American Association of Blood Banks, America's Blood Centers, and most recently, the American Medical Association, calling for HHS to amend the policy. The Blood Products Advisory Committee, a separate panel of blood safety experts convened by U.S. Food and Drug Administration, is contemplating endorsing this change as well.

While this is an important first step in a more comprehensive review and revision of the blood donation policies, merely changing the parameters of this discriminatory policy does not alter its underlying essential nature, eliminate its negative and stigmatizing effects, nor transform it into a policy based on current scientific and medical knowledge.

To accomplish this, the policy must be changed to one based on the conduct of the potential donor and not on sexual orientation, gender identity or the perceived health status or risk factors of the donor's sexual partners. In its hierarchy of risk for the transmission of HIV, the Centers for Disease Control and Prevention focuses entirely on behavior, not sexual orientation or gender identity. Regardless of the varying degrees of prevalence between communities, the fact remains that a person can only become HIV-positive after engaging in activities that present a risk of transmission. To base deferrals primarily on prevalence within certain communities rather than behavior could serve to disqualify other segments of the population based on race, sex and where they reside, a very slippery slope toward what is more easily recognized as illegal discrimination.

With these things in mind, a policy should be based on: (1) the sensitivity of the current tests for blood-borne pathogens and (2) deferrals based on donor self-report of activities involving a significant risk of transmission during the relatively short window period of these more sensitive tests.

First, the current length of the deferral period is arbitrary and is untethered from the sensitivity of current testing technologies. Because the deferral policies work in conjunction with the primary method of protecting the blood supply — the testing of all blood donations — the deferral policies should be targeted at and tailored to the existence of blood-borne pathogens that those tests may not detect. As the commonly used current tests detect HIV within 9-11 days of contact and detect Hepatitis B, which has the longest window period, within 20-25 days, a reasonable deferral period would be two months at most.

Second, to eliminate the discriminatory, stigmatizing and anti-prevention aspects of current donation policies, deferrals should be based entirely on the potential donor's conduct during that dramatically shortened window period.

As detailed by the CDC, we now know the hierarchy of relative risks of HIV transmission. For instance, receptive anal sex is approximately 10 times riskier than either insertive anal sex or receptive vaginal sex. Therefore, HHS need only determine the point along the risk spectrum it deems tolerable — perhaps that point is the significant jump in risk associated with receptive anal sex — and implement a deferral based on engaging in that conduct, without regard to the donor's sex, sexual orientation or gender identity. Furthermore, the deferral period could be eliminated altogether by an individual's use of the most effective prevention methods, such as condoms or pre-exposure prophylaxis — which we now know is as effective as condoms when taken at least four times a week — during the window period.

At whichever point on the spectrum HHS determines is a tolerable level of risk for pathogen acquisition within the deferral period (everyone agrees zero risk is an unachievable goal), the policy should be applied equally to everyone and based on information within the personal knowledge and control of the potential donor — because a woman does necessarily not know if she is having sex with a man who has sex with men, and no one knows if they are in a completely monogamous relationship. And if the blood collection industry is squeamish about asking potential donors the intimate details of their sexual history, we need to clarify that this is the place where compromise is unacceptable — getting accurate and complete information from potential donors is an imperative for protecting the blood supply. If potential donors don't want to share that information, then they should be the ones excluded from donating.

If we are serious about a policy that is truly most protective of the blood supply, it will treat all donors the same and base any deferrals on the conduct of those individuals within a scientifically justified "window period" prior to donation. And, as an added benefit, this policy is nondiscriminatory — which brings a happy change to the nation's blood donation policy. Now, the only question that remains is why the government wouldn't fully embrace this win-win approach. We eagerly await appropriate action.

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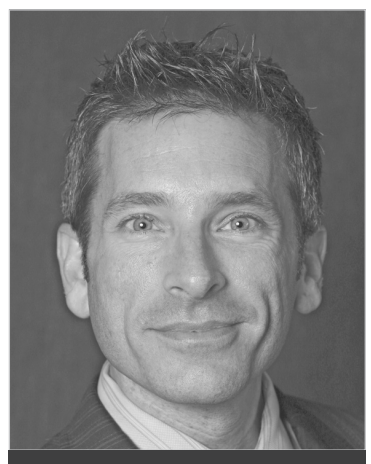

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Pending high court case may change lien-stripping game

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Despite this reasoning, the Supreme Court, in *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993), made lien stripping available to Chapter 13 debtors. Chapter 13 bankruptcies, however, are vastly more complex than Chapter 7 cases. In Chapter 13, the debtor commits post-petition income in excess of reasonable expenses to repay pre-petition debts. The debtor must then file a plan to repay the creditors. The plan must contain the appropriate content and pass numerous tests before the court will confirm it. Unlike Chapter 7, the Chapter 13 bankruptcy process is more time consuming and a debtor may ultimately fail to confirm and execute a plan of reorganization. It should come as no surprise that only 9,326 Chapter 13 petitions have been filed in the Central District of California this year compared to 38,251 Chapter 7 petitions.

For over 20 years, this was the basic understanding of bankruptcy law. Then, in 2012, the law began to change. The 11th U.S. Circuit Court of Appeals, in *McNeal v. GMAC Mortgage LLC*, 735 F.3d 1263 (2012), ruled that it is actually permissible to "strip off" second mortgage liens in Chapter 7 where the subject property held less value than what is owed on the first mortgage. The court circumvented *Dewsnup* with the novel legal premise that "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing."

The effect of the *McNeal* decision was almost immediate. In Florida, a state hit hard by the 2007 subprime mortgage crisis, hundreds of debtors filed an onslaught of motions and complaints to strip off wholly underwater junior liens, creating significant problems for junior lienholders. Most creditors could only take comfort in the fact that *McNeal* was a maverick decision with no precedential value outside of the 11th Circuit.

That may be about to change. In November, the Supreme Court granted certiorari in two of the three Chapter 7 lien-strip-off cases challenging *McNeal*. *Bank of Amer. v. Toledo-Cardona*, 14-163, and *Bank of Amer. v. Caulkett*, 13-1421 (petition granted Nov. 17, 2014) (consolidated for argument). If the Supreme Court upholds *McNeal*, creditor rights' attorney should expect an onslaught of Chapter 7 lien strip off cases throughout the United States.

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When facing a lien strip motion for the first time, most attorneys will be immediately struck by its arbitrariness. If, after deducting prior encumbrances, there is even $1 of equity in the real property, then the junior mortgagee can protect its claim from modification. For example, a creditor possesses a $10,000 claim secured by a second deed of trust against the debtor's house. If the house's value is $79,999 and the balance on the first mortgage is $80,000, then no value exists for the second deed of trust and the creditor is left with an unsecured claim. If, on the other hand, the house is worth $80,001 instead of $79,999, there would be at least $1 of value for the second deed of trust, preventing the debtor from stripping off the entire second mortgage of $10,000. In such a situation, a creditor's $10,000 claim would be affected by a $2 variation in the home's value.

Appellate courts recognized these odd results and have offered several explanations. In *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663, 669 (2002), the 6th Circuit addressed this issue by simply stating: "[W]e live in a world that abounds with arbitrary distinctions … [T]his court holds no warrant to cleanse the United States Code of arbitrary distinctions." The 3rd Circuit agreed, maintaining that "bright-line rules that use a seemingly arbitrary cut-off point are common in the law," *McDonald v. Master Fin. Inc. (In re McDonald)*, 205 F.3d 606, 613 (2000), and concluded that "line drawing is often required in the law and, at the boundary, the appearance of unfairness is unavoidable." Despite these rationales, the fact remains that bankruptcy law can be used to eviscerate a lien when the subject property's value will surely rise and create equity for the junior lienholder shortly after its lien has been avoided.

With a wave of lien stripping actions potentially on the horizon, creditors must be prepared to protect their liens from modification. Creditors' first priority must be to procure a full appraisal of the subject property upon the filing of a bankruptcy case. Obtaining the highest estimated value possible from a qualified appraiser is the best weapon against strip-off. Other countermeasures include verifying the validity and amount of the senior lien and confirming that the excess discretionary income of the debtor created by the voided lien does not bar him from filing a Chapter 7 petition. If the Supreme Court changes the rules of lien stripping, then creditors must readjust their strategies to protect their collateral.

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